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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 262

LORRAINE WILSON AND HULDAH DIEKMANN,
Petitioners,
Appellants below,

vs.

VAN VECHTEN SHAFFER, DON BARNES,
ARTHUR BARLOW, FRANK BYERS,
THE SHORES COMPANY, A CORPORATION, and
SHORES-MUELLER COMPANY, A CORPORATION,
Respondents,
Appellees below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

GEORGE BAYARD JONES,
141 W. Jackson Blvd.,
Chicago, Illinois,
Attorney for Petitioners.

IRVING B. CAMPBELL,
EDWARD J. DAHMS,
Of Counsel.

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Respondents,
Appellees below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Eighth Circuit entered on April 17, 1944, affirming the decree of the District Court of the United States for the Northern District of Iowa entered April 17, 1943, as to your petitioners, but reversing and remanding said decree of the

District Court as to your petitioners' co-plaintiffs, (Reported at 141 F. 2nd 877), and your petitioners respectfully show:

I.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (43 Stat. 938; 28 U.S.C.A. Sec. 347). The decision of the Circuit Court of Appeals was entered on April 17, 1944.

II.

Summary Statement of Matter Involved.

This is a suit in equity brought as a class case in the District Court of the United States for the Northern District of Iowa by petitioners and others, as stockholders of the Shores-Mueller Company, against respondents, who were its officers and directors, to declare a constructive trust with respect to stock of a new corporation, held by the respondents, to which new corporation defendants had caused the old corporation's property and business to be transferred in breach of trust. The exact nature of the breach is not material here. They also prayed for an accounting, that the constructive trust be executed, and general relief.

The respondents filed a motion to dismiss in the District Court alleging several grounds, including former adjudication. The prior case had been filed in the same court, and dismissed on motion as barred by limitations. The parties stipulated that the files and record in the prior case might be considered as in evidence, and the issue disposed of as though it had been raised by answer.

As to other plaintiffs, who were stockholders but not parties to the prior case, the District Court sustained the motion and dismissed this case on the ground that it was barred by the Iowa statute of limitations. (R. 31) As to your petitioners, the court sustained the motion to dismiss on the issue of former adjudication and, accordingly, dismissed the case, as to them, for that reason. (R. 31)

The Circuit Court of Appeals reversed the case as to the other plaintiffs upon the issue of limitations (R. 85), but affirmed as to petitioners on the issue of former adjudication.

The complaint in the former case (R. 32) alleged that "plaintiffs bring this suit in the right of said corporation, as stockholders thereof, and also for themselves as individual stockholders entitled to the assets of said corporation if it be found that the charter of said corporation has been forfeited, or cancelled." In other words, it was a secondary, or derivative, case which was alleged, and it was grounded upon alleged fraud upon the corporation, and conversion of its assets. (R. 37) The charter of the corporation had not been forfeited or cancelled.

The complaint in this case (R. 1) alleges a primary class suit by stockholders on the ground of breach of fiduciary duty by the officers of the corporation, owed to the stockholders directly, without intervention of the corporation. Plaintiffs claimed equitable ownership of stock in a new corporation which defendants had organized and to which they had transferred the property and business of the old corporation in violation of their fiduciary duty to its stockholders. The theory of the case was the following of trust property.

In the former case it was sought to set aside the challenged transactions for fraud, while in this case the object was to recover their product. Recovery is sought in this case

by the stockholders themselves, while in the former case recovery was sought for the corporation, and in its right.

III.

Question Presented.

The precise question involved is whether the filing of an action by a stockholder in which only secondary rights are asserted for the benefit of the corporation, is a bar to another action asserting a primary right of the stockholder arising out of the same factual situation.

IV.

Reasons Relied on for the Allowance of the Writ.

A.

The decision of said Circuit Court of Appeals as to the issue of former adjudication is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit, on the same matter (Supreme Court Rule 38, Par. 5(b)) in the case of *Bogert* v. *Southern Pacific Company*, 244 Fed. 61; affirmed on this issue by this Court, 250 U. S. 483, 490.

B.

The Circuit Court of Appeals decided an important question of general or federal law probably in conflict with applicable local and federal decisions, (Supreme Court Rule 38, par. 5(b)), in that it held that a decision in a stockholder's derivative suit, prosecuted in the right of the corporation, against officers to set aside certain transactions for fraud, was a bar to a primary suit by stockholders, affirming those transactions and claiming a trust

in the proceeds, based upon the officers' fiduciary duties owed to the stockholders directly without intervention of the corporation, and the right to follow trust property.

Respectfully submitted,

GEORGE BAYARD JONES,
Attorney for Petitioners.

IRVING B. CAMPBELL,
EDWARD J. DAHMS,
Of Counsel.

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SHORES-MUELLER COMPANY, A CORPORATION,
Respondents,
Appellees below.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 141 Federal Reporter (2nd) 877. The opinion is also printed in full in the record. (R. 75)

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended (43 Stat. 938; 28 U.S.C.A. Sec. 347).

The Circuit Court of Appeals has in this case rendered a decision which is, at the same time (1) in conflict with a decision of the Circuit Court of Appeals for the Second Circuit on the same matter (*Bogert* v. *Southern Pacific Company,* 244 F. 61; affirmed on matter in question, 250 U. S. 483, 490, 39 S. Ct. 533; 63 L. Ed. 1099), and (2) probably in conflict with applicable local decisions and other authority, on an important question of general law.

The decision in this case was entered by the United States Circuit Court of Appeals for the Eighth Circuit on April 17, 1944. (R. 85)

Statement of the Case.

Petitioners and others filed their complaint in the District Court alleging a class case by stockholders in their own right (not derivative) against officers and directors of their corporation, claiming a constructive trust in stock of a new corporation formed, and owned, by those officers, and to which they had caused the corporation's business and property to be transferred in breach of trust. The nature of the breach of trust is not material here, but is set forth in the decision of the Circuit Court of Appeals. (R. 75)

Respondents filed a motion to dismiss. As to petitioners, they alleged that this case was barred by former adjudication. This contention was adopted by the District Court, and the Circuit Court of Appeals affirmed on this point. As to the other plaintiffs, respondents moved to dismiss the case as barred by limitations. This, also, was adopted by the District Court, but on this issue the case was reversed and remanded by the Circuit Court of Appeals.

The prior case which has been found to bar petitioners in this case, was filed by petitioners and others in the same

District Court, and arose out of the same factual situation. That case was dismissed on motion, as barred by limitations. (*Wilson* v. *Shores-Mueller Co.*, D.C.N.D.Ia., 40 F. Supp. 729). That case, unlike this case, was derivative, or secondary, in its nature, and really asserted a cause of action running in favor of the corporation and could, if successful, have resulted only in a recovery by the corporation. No personal or primary rights of plaintiffs as stockholders were asserted or could have been decided.

The Circuit Court of Appeals acknowledged the distinction between a class case by stockholders in their own right, and a secondary action by stockholders in the right of the corporation. However, it held that the judgment in the prior case, a derivative case, was a bar to "their claim for a direct personal interest in the constructive trust property * * *."

The fact that the charges of fraud and collusion in the prior case included by implication the charge of breach of trust, and that the case need not have proceeded on the theory of fraud by the officers, is beside the point. Whether for fraud, or simply for breach of trust, it was in legal effect an action by the corporation for a wrong inflicted upon the corporation. The constructive trust there alleged was in favor of the corporation.

The constructive trust alleged in this case is said to arise in favor of plaintiffs because of a wrong done them directly by the defendants. They do not complain of a wrong done to the corporation.

In an analogous case, the United States Circuit Court of Appeals for the Second Circuit held that an adverse decision in a case wherein it was sought to set aside a transaction on the ground of fraud, was not a bar to a subsequent case by stockholders, in their own right, to declare a constructive trust in the fruits of that same transaction. (*Bogert* v. *Southern Pacific Co.*, 244 F. 61).

This Court allowed certiorari to review that decision (245 U.S. 668). Upon review it was affirmed in all respects material to this petition (*Southern Pacific Co.* v. *Bogert,* 250 U.S. 483).

We respectfully submit that the decision of the Circuit Court of Appeals in this case is in direct conflict with the decision of both courts in the case last cited. It was there decided that there was a duty owing by those in control of a corporation, to allow other stockholders to share in "the proceeds of common property," and that a prior unsuccessful case to set the transaction aside did not involve the same equity or amount to a prior adjudication. In this case, the decision is to the contrary; the Circuit Court of Appeals said: "They thereby lost the right to litigate further against defendants their claim for a direct personal interest in the constructive trust property on the basis either of fraud or of violation of fiduciary relationship and duty." (141 F. 2nd, 877, 882). The Court said that despite the fact that it recognized that this case, like the *Bogert* case, was an attempt to follow trust property (if not wholly so, at least in part) and not to set aside the transactions in question and restore the property to the corporation. The prior case was clearly of the latter kind (*Wilson* v. *Shores-Mueller Co.,* 40 F. Supp. 729), and derivative in its nature.

In other words, this Honorable Court, and the Circuit Court of Appeals for the Second Circuit, have held that an action to enforce the stockholders' primary right may be separately prosecuted, whereas the Circuit Court of Appeals for the Eighth Circuit has held in this case that a stockholder must submit all his rights, primary or secondary, when he brings an action.

The question at hand is an important principle of general, or "federal", law and, considering the importance of stockholders' remedies as one of the rapidly evolving

branches of law, it is in the public interest that this Honorable Court review this case, in order to resolve the conflict in decisions and to clarify the law on the subject involved.

Specification of Errors.

If the writ is granted, petitioners will urge that the Circuit Court of Appeals erred in the following respects:

(1) In holding, in effect, that when a stockholder files a case against officers and directors of the corporation for fraud or breach of trust, he cannot split his cause of action, but must submit all his rights, primary and secondary in nature, for equitable relief.

(2) In holding that the prior case involved petitioners' primary rights, which are asserted in this case, arising from breach of fiduciary duty owed directly by the unfaithful officers to the stockholders.

(3) In not holding that the prior case involved secondary or derivative rights only, and did not involve, or adjudicate, petitioners' primary rights and remedies coming to them for wrongs directly inflicted upon them by the unfaithful officers.

(4) In not holding that the only effect of the prior judgment was to decide that petitioners were not personally qualified to institute a derivative suit on behalf of the corporation, which was the only matter actually decided in that former case.

ARGUMENT.

Point I.

The decision of the Circuit Court of Appeals herein is in conflict with the decision of this Court and the Circuit Court of Appeals for the Second Circuit.

The equity claimed in this case (R. 6) is the same as in *Southern Pacific Co.* v. *Bogert*, 244 F. 61; 250 U.S. 483. This Court said in its opinion in that case (pg. 487):

> "In considering the many objections urged against the decree, it is important to bear constantly in mind the exact nature of the equity invoked by the bill and recognized by the lower courts. The minority stockholders do not complain of a wrong done the corporation or of any wrong done by it to them. They complain of the wrong done them directly by the Southern Pacific and by it alone. The wrong consists in its failure to share with them, the minority, the proceeds of the common property of which it, through majority stockholdings, had rightfully taken control. In other words, the minority assert the right to a pro rata share of the common property; and equity enforces the right, by declaring the trust on which the Southern Pacific holds it and ordering distribution or compensation. The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors. If through that control a sale of the corporate property is made and the property

acquired by the majority, the minority may not be excluded from a fair participation in the fruits of the sale."

In this case, control of the corporation was in respondents who had voting control under a voting trust agreement and had made themselves directors and officers of the corporation. It is alleged that they contrived a receivership and bought in the corporation's property and business at a grossly inadequate amount. The complaint asserts the following equity (R. 6):

> "23. That through the control of these defendants as trustees for the stockholders of the Shores Mueller Company a sale of the assets of said Company was made and said assets were acquired by these defendants to the exclusion of these plaintiffs and their fellow stockholders in the Shores Mueller Company for whom these defendants were *de facto* and authorized trustees, and that these plaintiffs have been excluded from a fair participation in the fruits of said sale which was executed for an inadequate consideration and in violation of the defendants duties of trust as trustees under the voting trust agreement executed in March of 1931, hereinbefore set out, and as trustees for the stockholders by virtue of their control of (fol. 8) the Shores Mueller Company."

The relief claimed (R. 8) is a pro rata share in the stock of the new corporation which the officers organized to take over the assets and business of the old corporation.

It is therefore clear that this case and the *Bogert* case are analogous, and are both based upon fiduciary duties owed directly to stockholders.

In the *Bogert* case, there had been much previous litigation, including, as in this instant case, an attempt by stock-

holders to set aside the sale. This Court (pg. 490) stated that the theory of the earlier case was "widely at variance" with the case then before the court, and the decision did not, therefore, operate as *res judicata.*

The case at bar is similar in this respect also; the earlier case appealed to another, and very different, equity (R. 32). It was filed in the right of the corporation and sought a recovery by it. The equity claimed in the instant case was not within the theory or principles of that case, and cannot, in justice, be said to have been submitted so as to have been adjudged. Nor were they adjudged in that case. *Wilson* v. *Shores-Mueller Co.*, 40 F. Supp. 729.

The decisions are thus in conflict. This Court, and the Court of Appeals for the Second Circuit, have recognized a separate equity and right to follow trust property, independent of the rights enjoyed derivatively through the corporation, and the Circuit Court of Appeals in this case has refused to recognize this equity, by holding that a judgment in a derivative case is a bar to all rights of any kind, except such incidental benefits as they might receive if other stockholders might be successful in a derivative case for the benefit of the corporation.

The Circuit Court of Appeals confused the issue. They pointed out that the complaint in the first suit, while alleging fraud and conversion, had within it, by implication, a charge of simple breach of trust. That may be true, and we do not seek to litigate that point, at least, at this time. But, granting that, the conclusion of the court does not follow. The fraud or breach of trust which was alleged was a wrong to the corporation. The error of the court lay in holding that a charge of breach of fiduciary duty owed directly to the stockholders (a wrong to them) could be implied in that case, and barred in this one. There also is the conflict, for this Court has refused to raise any such implication.

Point II.

The Circuit Court of Appeals has decided an important question of general, or federal, law in a manner probably in conflict with the weight of authority.

(a) The distinction between a stockholder's secondary action, in behalf of the corporation, (or, at least, in its right) and a stockholders' class case in their own right, is well established as a matter of general law, although not of frequent occurrence.

The following authorities deal with the nature of the derivative, or secondary, case:

Graham v. *Machine Works*, 138 Iowa 456; 114 N. W. 619.

Dillon v. *Lee*, 110 Iowa 156; 81 N. W. 245.

Ontjes v. *MacNider* (S. Ct. Iowa) 5 N. W. 2nd 860.

In re the Van Sweringen Co., 119 Fed. 2nd 231.

These authorities support the contention that stockholders may also have other rights, not derivative in their nature.

Southern Pacific Co. v. *Bogert*, 250 U. S. 483.

Pepper v. *Litton*, 308 U. S. 295.

Dawson v. *National Life Ins. Co.*, 176 Iowa 362; 157 N. W. 929.

Dunnett v. *Arn* (CCA 10th) 71 F. 2nd 912, 918.

Harris v. *Pearsall*, 190 N. Y. S. 61.

Fletcher, Cyclopedia of Corporations, Vol. 13, Sec. 5958.

On principle, a judgment is a case of one class, and in one of those rights, should not constitute a bar to the enforcement of the other.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Honorable Court should grant the writ of certiorari and review the decision of the United States Circuit Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

GEORGE BAYARD JONES,
Attorney for Petitioners.

IRVING B. CAMPBELL,
EDWARD J. DAHMS,
Of Counsel.

(27)

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BRIEF OF VAN VECHTEN SHAFFER, ET AL., RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

V. C. SHUTTLEWORTH,
1120 Merchants National Bank Bldg.
Cedar Rapids, Iowa,
Attorney for Respondents.

DON BARNES,
619 Higley Building,
Cedar Rapids, Iowa.

T. M. INGERSOLL,
1120 Merchants National Bank Bldg.
Cedar Rapids, Iowa.
Of Counsel.

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BRIEF OF VAN VECHTEN SHAFFER, ET AL., RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 141 Federal (2) 877.

STATEMENT OF THE CASE

This is a suit in equity brought in the United States District Court for the Northern District of Iowa by Petitioners and others as stockholders of the Shores-Mueller Company against Respondents who were its officers and directors to seek redress for certain alleged wrongs of the officers and directors in the operation, receivership and conversion of the assets of the corporation.

The Petitioners also made the Shores-Mueller Company and The Shores Company Defendants in the suit and averred that The Shores Company claimed some interest in the assets of the Shores-Mueller Company.

The petition alleges all of the facts which would entitle the Shores-Mueller Company to recover as if it were a stockholders' suit on behalf of the corporation.

An affidavit filed by Edward J. Dahms, one of the attorneys for the Plaintiffs in this cause, in support of a motion for production, impounding, inspection, and copying of documents and records, stated: "the above action is in one of its aspects a derivative action for the use and benefit of the Shores-Mueller Company "

Petitioners state in their petition that they bring the suit on behalf of themselves and all other stockholders of the Shores-Mueller Company who may choose to participate in the suit and contribute to the expenses.

The prayer is to have a trust declared for the benefit of the Plaintiff and other stockholders of the corporation and that the Defendants render an accounting and for general equitable relief. (R. pages 1-8.)

The District Court dismissed the petition holding that the action as to the petitioners was adjudicated adversely to them in the prior suit referred to herein as No. 41. It was stipulated by the parties in the record that the Court could

consider the entire record in No. 41 as if offered in evidence in this cause. (R. page 21, line 22.)

No. 41 was a suit brought by the petitioners and others against the Respondents herein. The Petitioners in No. 41 alleged that they brought the suit in the right of the Shores-Mueller Company as stockholders thereof and also for themselves as individual stockholders entitled to the assets of the corporation if the corporation's charter had been forfeited or cancelled. The allegations of the petition in No. 41 are substantially the same as the allegations in this action, except for the greater emphasis placed upon fraud in No. 41. The prayer in No. 41 is that the petitioners have judgment against the Defendants, but that if the Shores-Mueller Company is in existence and has the cause of action instead of the Petitioners that relief be given to the Shores-Mueller Company which the Petitioners would participate in as stockholders. The District Court dismissed the petition on the ground that the cause of action was barred by the Iowa Statutes of Limitation. (Wilson vs. Shores-Mueller Company, 40 Fed. Supp. 729.)

When the Petitioners herein came back in the District Court with the petition in this case, the trial court found that it was the same cause of action, only slightly different verbage, and that the Petitioners having failed to appeal in the first case were bound by the prior adjudication. (50 Fed. Supp. 103.) It does not affirmatively appear in the record whether the charter of the Shores-Mueller Company had been forfeited or cancelled or not. The petition in this case alleges the existence of a corporation which would give the petitioners only the same derivative rights which they alleged in No. 41.

The Petitioners herein did not stay the case in the Court below but an amended complaint has been filed in the trial court. An application to produce documents has been filed

and the cause is proceeding. The Petitioners have, therefore, waived their right to petition for certiorari.

Exception is taken to the allegation in the Petitioners' "Summary Statement of Matter Involved" that the complaint in this case alleges only a primary class suit and that in No. 41 only a derivative claim was alleged.

ARGUMENT

Summary of the Argument

POINT A. The Petitioners having sought the relief to which they were entitled as stockholders of the Shores-Mueller Company either directly or through the Shores-Mueller Company in the cause entitled Lorraine Wilson vs. Shores-Mueller Company, et al., referred to herein as No. 41, and the matter having been adversely adjudicated to them therein, the Circuit Court of Appeals for the Eighth Circuit in this cause correctly determined that the prior adjudication was binding upon the petitioners when they allege the same factual situation and pray for the same relief in this case.

POINT B. The decision of the Circuit Court of Appeals for the Eighth Circuit in this case was upon a factual matter and not a matter of the character in which certiorari will be granted.

POINT C. The Circuit Court of Appeals did not decide an important question of general or federal law probably in conflict with applicable local and federal decisions, but decided a factual matter under Iowa law of interest only to the litigants in this case.

POINT D. The decision of the Circuit Court of Appeals is not in conflict with the decisions of any other Circuit Court of Appeals.

POINT E. Petitioners are bound by the ruling in No. 41 on not only every issue presented therein, but every issue that could have been presented.

Point A

The petitioners having sought the relief to which they were entitled as stockholders of the Shores-Mueller Company either directly or through the Shores-Mueller Company in the cause entitled Lorraine Wilson vs. Shores-Mueller Company et al., referred to herein as No. 41, and the matter having been adversely adjudicated to them therein, the Circuit Court of Appeals for the Eighth Circuit in this case correctly determined that the prior adjudication was binding upon the petitioners when they allege the same factual situation and pray for the same relief in this case.

There is nothing in the petition inconsistent with a derivative or secondary suit and the petitioners do not change the character of their action by alleging that they bring the suit on behalf of themselves and all other stockholders of the Shores-Mueller Company. The petitioners are seeking to enforce their rights, whatever they are, through the corporation or individually, if the corporation is without rights in the premises.

The complaint in No. 41 alleged that the Defendants stood in a fiduciary relation to the Plaintiffs; that they had in that fiduciary capacity taken control of the entire property of the Shores-Mueller Company and converted the same to their own use and benefit; that they had transferred the property and assets to the Shores Company and constituted themselves directors and officers; that the Plaintiffs had contributed to the payment of attorney fees and costs, and various actions were commenced by various stockholders in behalf of themselves and all other stockholders but that

none of said actions were properly brought nor the proper remedy sought and these Plaintiffs, at the request of numerous other stockholders, brought this action and that only through an action in equity can an accounting be had and these Plaintiffs be afforded complete relief herein; then they pray for judgment against the Defendants for all the amounts unlawfully converted aforesaid and that the Shores-Mueller Company recover of the other defendants the amounts found due and in the event it be found that the Shores-Mueller Company has no legal status as a corporation, that these Plaintiffs have for themselves, and all other stockholders who may join in this action, an accounting and judgment and decree in such amount as will equal the value of the real estate, assets, good will and rents, issues and profits derived from the ownership and control of the Shores-Mueller Company as converted by the Defendants and to which the Plaintiffs herein are entitled as stockholders of said corporation, and for such other and further relief as may be just and equitable in the premises. (Record page 32.)

These allegations from a legal standpoint and the remedy sought justify the factual findings and decision of the District Court and the Circuit Court of Appeals.

Point B

The decision of the Circuit Court of Appeals for the Eighth Circuit in this case was upon a factual matter and not a matter of the character in which certiorari will be granted.

In the opinion of the Circuit Court of Appeals for the Eighth Circuit they stated:

> "There remains the res judicata question as to two of the plaintiffs. On that issue, we must affirm the holding of the District Court. The complaint in the previous

action, just as the one here, sought to impose a *constructive trust* against acts done by the defendants while they were officers and directors of the corporation. While the fraud and collusiveness of their actions were directly alleged, their status as officers and directors was also specifically stated. Just as in the present suit, therefore, jurisdiction *could have rested either on actual fraud or on violation of fiduciary relationship and duty.* The holding that the situation was required to be treated as one for relief on the ground of fraud, and so was barred, was, as in the present case, on the facts shown by the complaint, an inherent adjudication by the district court that the limitation provision which the court applied could not be escaped on the theory of violation of *fiduciary relationship and duty.* Plaintiffs had the same remedy open to them by an appeal in that case as in the present one. They accepted the dismissal and its adjudicatory effect. They thereby lost the right to litigate further against defendants their claim for a direct personal interest in the constructive trust property on the basis either of fraud or of violation of fiduciary relationship and duty. Restatement, Judgments, Sec. 49, Comment a; Northern Pac. Ry. Co. vs. Slaght, 205 U. S. 122, 131, 26 S. Ct. 442, 51 L. Ed. 738; Cooley v. Maine, 183 Iowa 560, 165 N.W. 1015, 1016. What might be the situation as to their rights, if a recovery of assets should be decreed in favor of the old corporation, we need not now consider."

It will be observed from the foregoing that both the District Court and the Circuit Court of Appeals for the Eighth Circuit construed the pleadings filed in the instant case and in Cause No. 41 as actions asserting the same rights of the stockholders arising out of the same factual situation.

This Court on certiorari will not review a question of mixed law and fact upon the decision of which the whole case turns.

> Chicago, Burlington & Quincy Railway Co. vs. Williams, 205 U. S. 446, 51 L. Ed. 875.

In the case of United States vs. Mayer, 235 U. S. 55, 59 L. Ed. 129, Chief Justice Hughes said:

> "It is a familiar rule that this Court cannot be required through a certificate under Section 239 to pass on questions of fact or mixed questions of law and fact."

> See also Cleveland-Cliff Iron Co. vs. Artic Iron Co., 284 U. S. 178; 63 L. Ed. 198.
> California Artificial Stone Paving Co. vs. Molitor, 113 U. S. 609, 28 L. Ed. 1106.

Point C

The Circuit Court of Appeals did not decide an important question of general or federal law probably in conflict with applicable local and federal decisions, but decided a factual matter under Iowa law of interest only to the litigants in this case.

The Court said in Ex parte Woods, 143 U. S. 202, 36 L. Ed. 125:

> "Whether the law of Minnesota that a judgment of dismissal is not a bar to a second suit for the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on

> the trial of a case, are not questions of such gravity and importance as to require the review by this court of the conclusions of the Circuit Court of Appeals in reference to them."

In the case of Pflueger vs. Sherman, 293 U. S. 55, 79 L. Ed. 193, the Court said:

> "It is not clear to the court whether this is a stockholders' suit or one on behalf of the individual complainants. * * * The certificate fails to conform to the requirements that questions submitted must be questions of law and not mixed questions of law and fact."

The certificate was dismissed.

Point D

The decision of the Circuit Court of Appeals is not in conflict with the decisions of any other Circuit Court of Appeals.

The claim is made that the decision of the Circuit Court of Appeals in this cause is contrary to the decision of the Circuit Court of Appeals for the Second Circuit, on the same matter in the case of Bogert vs. Southern Pacific Company, 244 Fed. 61, affirmed on this issue by this Court, 250 U. S. 483, 490.

The Court in the Bogert case, in reference to the issues presented in the Supreme Court, said:

> "The Southern Pacific contends that adverse decisions in the earlier litigation are a bar either as an estoppel or by way of election of remedies; since the prosecution of some, if not all, of the earlier suits, also was actively supported, by the minority stockholders'

committee, and the plaintiffs are bound as privies to the full extent to which the decrees therein constitute res judicata. *But in none of these suits was the question here in issue decided.* Except in so far as those cases were disposed of on objections to jurisdiction, they decided merely that the foreclosure could not be set aside as fraudulent; that the minority stockholders could not have the reorganization agreement declared fraudulent; and that they could not compel a reduction of the assessment made under it, or enjoin distribution of the stock according to its terms. The minority stockholders sought, when presenting the case in the court of appeals of New York (MacArdell v. Olcott, 189 N.Y. 368, 372, 373, 82 N.E. 161), to have declared the trust which was later decreed in this suit; but that court refused to consider the contention, for the reason that this claim to relief was based upon a theory 'widely at variance' with that upon which that action was commenced and tried. *Because of such wide divergence the earlier decrees do not operate as res judicata.*"

There was no divergence in this cause. The District Court made the following *Finding of Facts*:

(1) That the statements and allegations of the Complaint in this cause cover the same matter and restate and replead the matters alleged and set forth in the Complaint in the cause wherein Lorraine Wilson et al., are Plaintiffs, and the Shores-Mueller Company et al., are Defendants, No. 41 Civil.

(2) That the claims and matters set forth in said complaint in cause No. 41 Civil have been adversely adjudicated to the Plaintiffs therein by the decision of this Court entered on the 13th day of September, 1941, and that the Plaintiffs' petition for rehearing and for leave to amend therein was overruled

by this Court on the 10th day of October, 1941, and that no appeal has been taken or is pending from said rulings, orders, and decisions of this Court, and said rulings, orders and decisions of this Court became and are final.

And the following Conclusions of Law:

That as to all plaintiffs other than Thomas Liken, Dorothy Brauer and Grace L. Nystrom, the final judgment entered in Cause No. 41 Civil, is res judicata of all issues in this case. (Record page 30.)

The Bogert case having been decided under peculiar facts and being a fact case with many issues and being decided before recent decisions of this Court that local law is controlling, no question of conflict between or among the Circuit Courts of Appeal is involved herein.

These rulings were affirmed by the Circuit Court of Appeals.

See also: Ruhlin vs. New York Life Insurance Co., 304 U. S. 302, 83 L. Ed. 1290.

Point E

Petitioners are bound by the ruling in No. 41 on not only every issue presented therein, but every issue that could have been presented.

The ruling of the Court in Case No. 41 Civil is an adjudication of the rights of the Plaintiffs, Lorraine Wilson and Huldah Diekmann, in the case at bar.

In the case of Northern Pac. Ry. Co. vs. Slaght, 205 U. S. 122, 51 L. Ed. 739, the Court said:

> "It is well established that a judgment on demurrer is as conclusive as one rendered upon proof, Gould vs. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416; Bissell

vs. Spring Valley Twp. 124 U. S. 225, 31 L. Ed. 411, 8 Sup. Ct. Rep. 495."

The Court further said:

"The general rule of the extent of the bar is not only what was pleaded or litigated, but what could have been pleaded or litigated."

See also:

Hansberry vs. Lee, 31 U. S. 41, 43, 85 L. Ed. 27;
Plumb vs. Goodnow (Plumb vs. Crane) 123 U.S. 560;
Confectioners' Machinery & Mfg. Co. vs. Racine Machinery Co., 163 Fed. 914;
Bryant Electric vs. Marshall, 169 Fed 426;
Smith vs. Swormstedt, 16 How. U. S. 288; 14 L. Ed. 942;
Christopher vs. Brusselback, 302 U. S. 503 and cases cited;
Lee vs. School District, 149 Iowa 345, 128 N.W. 533;
Sovereign Camp of the Woodmen of the World, Petitioner, vs. William F. Bolin et al., 305 U. S. 66, 83 L. Ed. 45;
King vs. Realty Co., 107 Fed. (2) 90;
Waybright et al. vs. Columbian Mut. Life Ins. Co., 30 Fed. Supp. 885;
Purcell vs. Summers, 34 Fed. Supp. 421;
Dana vs. Morgan, 232 Fed. 85.

CONCLUSION

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and

that the petition for a writ of certiorari should be denied.

Dated August 21, 1944.

V. C. SHUTTLEWORTH,
1120 Merchants National Bank Bldg.,
Cedar Rapids, Iowa,
Attorney for Respondents.

DON BARNES,
619 Higley Bldg.,
Cedar Rapids, Iowa,

T. M. INGERSOLL,
1120 Merchants National Bank Bldg.,
Cedar Rapids, Iowa,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 262

LORRAINE WILSON AND HULDAH DIEKMANN,
Petitioners,
Appellants below,

vs.

VAN VECHTEN SHAFFER, DON BARNES,
ARTHUR BARLOW, FRANK BYERS,
THE SHORES COMPANY, A CORPORATION, and
SHORES-MUELLER COMPANY, A CORPORATION,
Respondents,
Appellees below.

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

GEORGE BAYARD JONES,
141 W. Jackson Blvd.,
Chicago 4, Illinois,
Attorney for Petitioners.

IRVING B. CAMPBELL,
EDWARD J. DAHMS,
Of Counsel.

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PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

A.

It is true, as respondents say in their Statement of the Case, that the complaint in this case alleges all of the facts which would entitle the plaintiffs to recover in a derivative case on behalf of the old corporation, and that there is a prayer for general relief. Therefore, as we recognized in our brief in support of the petition, your petitioners might not be entitled to all of the relief which the allegations would justify, *i.e.*, derivative relief

on behalf of the corporation. That is what they tried to obtain in the prior case, and failed. But other plaintiffs are not under this same limitation.

However, there is the additional fact alleged in this case (R. 6) that plaintiffs have been excluded from a fair participation in the fruits of the sale of the corporate property and business to defendants, which lays a basis for a primary case also. (*Southern Pacific Co.* v. *Bogert*, 250 U.S. 483). That is the gist of the wrong inflicted directly upon the stockholders. The other wrongs alleged give rise only to an action in behalf of the corporation. The complaint in the prior case did not contain a comparable allegation of a wrong to stockholders, directly, and did not seek to assert any primary right.

The fact that the complaint in the prior case (R. 32) alleged that "plaintiffs bring this suit in the right of said corporation, as stockholders thereof, and also for themselves as individual stockholders entitled to the assets of said corporation if it be found that the charter of said corporation has been forfeited, or cancelled," did not make that case anything more than derivative. The plaintiffs, in either circumstance, complain only of a wrong to the corporation which they could enforce for it, or as successors in interest to it.

Alexander v. *Hillman*, 296 U.S. 222.

Dana v. *Morgan* (CCA 2nd) 232 Fed. 85.

The respondents admit the continued existence of the corporation, as a corporation sufficient to receive a recovery in this case, by filing its appearance and joining it as a moving party and the motion to dismiss in this case (R. 16). If the corporation was still in existence when this suit was filed, it was in existence when the prior suit was commenced.

Petitioners claimed no personal rights in the prior case except in the event that the corporation was unable to accept the benefit of any decree. That contingency did not occur.

The fair conclusion is that the prior case was derivative only, and this case is broad enough to be considered an assertion of both derivative and primary rights. Petitioners may not be entitled to act for the corporation and assert derivative rights, but they can assert their cause of action for the wrong directly inflicted upon them, which is the only relief specially prayed.

Southern Pacific Co. v. *Bogert,* 250 U.S. 483.

Other plaintiffs may be entitled to relief of either kind, derivative or primary.

In the last analysis, respondents' contention is that petitioners' rights of a primary nature (and which are sought to be asserted in this case) could have been decided in the prior case, and, therefore, are to be considered as barred by the judgment, even though they were not actually adjudicated. We concede that if those rights could have been decided in that case, they are within the bar of *res judicata.* But, we say that they could not have been decided in the prior case.

The rule upon which respondents rely applies only if the cause of action is the same in each case.

United Shoe Machinery Corp. v. *U. S.,* 258 U.S. 451.

In the prior case, the old corporation was the real plaintiff and the basis of the action was a breach of duty owed to it.

Hutchinson Box Board Paper Co. v. *Van Horn* (CCA 8th), 299 Fed. 424.

Johnsen v. *Ingersol* (CCA 7th), 63 Fed. 2nd 86.
Smith v. *Bradlee*, 37 N.Y.S. 2nd 512.
Davenport v. *Dows*, 85 U.S. 626, 21 L. Ed. 938.
Pomeroy, Equity Juris., 5th Ed., Sec. 1094-1095.

In this case (insofar as it is brought in the stockholders' primary right) the petitioners were the real parties in interest and the basis of the action is a breach of duty owed by respondents to petitioners, directly and independently of the duty to the corporation.

Southern Pacific Co. v. *Bogert*, 250 U.S. 483, 63 L. Ed. 1099.

The causes of action are not, therefore, the same. Compare *Missouri-Kansas Pipe Line Co.* v. *U. S.*, 312 U.S. 502, 508.

The parties were not, in law, the same.

Fletcher, Cyc. of Corporations, Penn. Ed., Sec. 5953.
Hutchinson Box Board Paper Co. v. *Van Horn* (CCA 8th) 299 Fed. 424.
Troutmann v. *Council Bluffs Street Fair and Carnival Co.*, 142 Iowa 140; 120 N.W. 730.

"There is a vast difference between the right of a shareholder to sue for the redress of an injury done to the corporation, and the right to sue to redress an injury done to the shareholder individually."

Dana v. *Morgan* (CCA 2nd) 232 Fed. 85, 89.

B.

An amended complaint has been filed by other plaintiffs (not petitioners herein) in the District Court, as respondents allege. However, *petitioners* have not done anything which could be considered a waiver of their right to complain of the judgment against them, or to petition

for certiorari. Other plaintiffs could not do that for them, as respondents contend.

If the dismissal of the case as to them should be reversed, nothing done in the District Court will have to be undone. Petitioners' rights are not different from those of other stockholders who are plaintiffs. The District Court would need only to know before ordering final distribution of the proceeds of the case, considered as brought in the stockholders' primary right, whether petitioners were entitled to share therein. That is a long way off, and if this matter should be then pending, the District Court can defer the final closing of the case.

C.

This petition does not present an issue of fact. A motion to dismiss admits the facts well pleaded. The issue presented in this case is whether the judgment in the former case bars relief in this case. Both records are before the court, and the question whether both cases involved the stockholders' primary rights is a pure question of law. Moreover, it is a question of federal law, *i.e.*, the effect of a judgment of a United States court.

We respectfully submit that this is a matter which ought to be uniform in the several circuits, and that it would be appropriate for this Honorable Court to review this case in order to resolve the conflicts pointed out in our petition and supporting brief.

Respectfully submitted,

GEORGE BAYARD JONES,
Attorney for Petitioners.

IRVING B. CAMPBELL,
EDWARD J. DAHMS,
Of Counsel.